Supreme Court, U. S.
FILED
MAY 15 1979
MICHAEL RODAK, JR., CLERK

PETITION

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1719

DR. JOSEPH T. SKEHAN,

Petitioner,

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, DR. ROBERT NOSSEN, DR. CHARLES CARLSON, JOHN PITTENGER, Superintendent of Education, Commonwealth of Pennsylvania, and BLOOMSBURG STATE COLLEGE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NOS. 77-2311 AND 77-2312.

PETITION FOR A WRIT OF CERTIORARI

CLETUS P. LYMAN
RICHARD A. ASH
Attorneys for Petitioner

LYMAN & ASH
1612 Latimer St.
Philadelphia, PA 19103
(215) 732-7040

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON
EASTERN PENNSYLVANIA REPRESENTATIVE
THE PLAZA, SUITE 23F, PHILADELPHIA, PA 19103
PHONE: (215) 568-7788

LAW OFFICES OF
LYMAN & ASH
1612 LATIMER STREET
PHILADELPHIA 19103
732-7040 AREA CODE 215

CLETUS P. LYMAN

May 23, 1979

RECEIVED
MAY 29 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Michael Rodak, Jr., Esquire,
Clerk, Supreme Court of
the United States
One First Street NE
Washington, DC 20543

Re: Skehan v. Board of Trustees, etc., et al.
Petition No. 78-1719

Dear Mr. Rodak:

The above petition was filed May 15, 1979. There is an error on line 4, paragraph 4, page 8, to wit:

"without pay" should be "with pay".

Can the syllable "out" be manually struck out?

Very truly yours,

Cletus P. Lyman

CC: Allen C. Warshaw, Esquire,
Deputy Attorney General

INDEX.

	Page
Opinions and Judgments Below	1
Jurisdiction	5
Constitutional and Statutory Provisions Involved	6
Statement of Questions Presented for Review	6
Statement of the Case	8
1. Nature of the Case	8
2. Statement of Facts	8
3. Course of the Proceedings	11
Reasons Why Writ Should be Allowed	16
1. The Court of Appeals has decided federal questions in ways in conflict with applicable decisions of this Court	16
2. The Court of Appeals rendered a decision on an important question of federal law, which has not been squarely decided by this Court and which points out disharmony of decisions of this Court. Its decision is in conflict with the apparently controlling decision of this Court	19
3. This petition raises additional questions of federal law which should be settled by this Court	21
Conclusion	23
Constitutional and Statutory Provisions Involved in the Case	24
Excerpts from the Pennsylvania Mandamus Act of 1893, as amended, 12 P.S. § § 1911 *et seq.*	26
Section 2310 of Pennsylvania Act No. 78-152, 42 Pa. C.S.A. § 2310	27

Page

TABLE OF CASES.

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 2
Board of Regents v. Roth, 408 U.S. 564 (1972) .6,15,16,17, 18,21,22
Brungard v. Hartman, 12 Pa. Commw. 477, 315 A.2d 913 (1974) 13,14
Edelman v. Jordan, 415 U.S. 651 (1974) 19,20
Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) 18
Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, ... U.S. ...., 99 S.Ct. 1171 (1979) 16
Monell v. Department of Social Services of City of New York, 436 U.S. 658, 98 S.Ct. 2018 (1978) 14,16,19,20
Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977) 21
Paul v. Davis, 424 U.S. 693 (1976) 17,18
Quern v. Jordan, ... U.S. ...., 99 S.Ct. 1139 (1979) 19,20
Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970) ... 22
United States v. Lovett, 328 U.S. 303 (1946) 18
Wieman v. Undegraff, 344 U.S. 183 (1952) 15,17,18
Wood v. Strickland, 420 U.S. 308 (1975) 2,6,18

STATUTES.

Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988 13
Section 2310 of Pennsylvania Act No. 78-152 (House Bill No. 2437), 42 Pa. C.S.A. § 2310 6,7
Title 42 U.S.C. § § 1983 and 1988; the Pennsylvania Mandamus Act of 1893, as amended, 12 P.S. § 1911, *et seq.* 6,7,14,16,19,20,22

Page

Public School Code of 1949, as amended, Title 24 P.S. § § 20-2001, *et seq.* 9
Title 28 U.S.C. § 1343 8

CONSTITUTIONS.

Commonwealth of Pennsylvania Constitution:
Section 17, Article I 6
United States Constitution:
Section 9, Article I 6
Amendment XIV 6,8,18

RULE.

Rule 52(a), F.R.C.P. 15

IN THE

Supreme Court of the United States

October Term, 1978

No. .....

DR. JOSEPH T. SKEHAN,

Petitioner,

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, DR. ROBERT NOSSEN, DR. CHARLES CARLSON, JOHN PITTENGER, former Superintendent of Education of the Commonwealth of Pennsylvania, and BLOOMSBURG STATE COLLEGE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Dr. Joseph T. Skehan ("Dr. Skehan"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, rendered in these proceedings on December 21, 1978 (52a).

Opinions and Judgments Below

The United States District Court for the Middle District of Pennsylvania entered judgment, awarding plaintiff $1.00, together with costs, on May 11, 1973, with opinion. The judgment and opinion are printed in the Appendix at 207a-218a and the opinion is reported at 358 F.Supp. 430 (M.D.Pa. 1973). The District Court denied the motions of Dr. Skehan to

amend the judgment and to award attorneys fees on June 12, 1973, with opinion. The opinion and order are printed in the Appendix at 219a-221a and are unreported. The District Court denied Dr. Skehan's motion to reconsider its opinion on June 13, 1973. The order is printed in the Appendix at 222a-223a and is unreported.

The United States Court of Appeals for the Third Circuit entered judgment, vacating the judgment of the District Court and remanding for findings of fact and further proceedings, on May 3, 1974, with opinion. The judgment and opinion are printed in the Appendix at 177a-205a and the opinion is reported at 501 F.2d 31 (3d Cir. 1974). The Court of Appeals denied rehearing on June 11, 1974, without opinion. The order of the Court of Appeals is printed in the Appendix at 206a.

This Court entered an order granting Dr. Skehan's petition for a writ of certiorari on May 27, 1975, and by the same order vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals for further consideration in light of *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975) and *Wood v. Strickland,* 420 U.S. 308 (1975). The order of this Court is printed in the Appendix at 176a and is reported at 421 U.S. 983 (1975).

The Court of Appeals entered judgment, vacating the judgment of the District Court and remanding the case to the District Court for findings of fact and further proceedings, on May 13, 1976, with opinion. The opinion of the Court of Appeals is printed in the Appendix at pages 154a-175a and is reported at 538 F.2d 53 (3d Cir. 1976). This Court denied the petition of present respondents, the Board of Trustees of Bloomsburg State College, Dr. Robert Nossen, Dr. Charles Carlson, John Pittenger, former Superintendent of Education of the Commonwealth of Pennsylvania, and Bloomsburg State College, on November 29, 1976, without opinion. The order of this Court is printed in the Appendix at 153a.

The District Court denied Dr. Skehan's motion for leave to file an amendment to the complaint on December 23, 1974, with opinion. The opinion and order are printed in the Appendix at 151a-153a and are unreported. The District Court denied Dr. Skehan's motion to take additional testimony and granted respondents' motion to take additional testimony on January 10, 1977, with opinion. The opinion and order are printed in the Appendix at pages 146a-150a and are unreported.

The District Court entered judgment on March 24, 1977, on Dr. Skehan's First Amendment claim with order and opinion. The order and opinion are printed in the Appendix at 129a-145a and are unreported.

The District Court entered an interlocutory judgment on May 18, 1977, without any operative provision. The judgment was an aborted effort to implement the opinion of the District Court entered the same day, holding that Dr. Skehan prevailed on several parts of his claims and that respondent Nossen prevailed on certain defenses. The judgment and opinion are printed in the Appendix at 101a-129a and the opinion is reported at 431 F.Supp. 1379 (M.D.Pa. 1977).

The District Court entered judgment on July 20, 1977, with opinion, providing that Dr. Skehan's claim for attorneys fees and expenses was denied; that Dr. Skehan should be restored to "the suspended status" which he had on October 15, 1970; and that a series of hearings and other procedures should commence to determine whether his contract of employment as a faculty member of Bloomsburg State College should be renewed and, if renewed, whether he should be terminated for cause or whether proceedings against him should be dropped. The judgment and opinion are printed in the Appendix at pages 78a-101a and the opinion is reported at 436 F.Supp. 56 (M.D.Pa. 1977).

The District Court denied Dr. Skehan's motion for a new trial without prejudice on August 2, 1977, without opinion. The order is printed in the Appendix at pages 63a-64a. The District Court denied Dr. Skehan's petition to plead and conduct his own case during the post-trial proceedings on August 10, 1977, without opinion. The order is printed in the Appendix at pages 65a-66a. The District Court denied the motion of counsel who represented Dr. Skehan to withdraw, without prejudice, on August 22, 1977, without opinion. The order is printed in the Appendix at 67a-68a. The District Court denied Dr. Skehan's motion to reinstate his motion for a new trial and to plead and conduct his own case without prejudice, on August 22, 1977, without opinion. The order is printed in the Appendix at 69a-70a.

The District Court granted the motion of counsel for Dr. Skehan to withdraw on August 31, 1977, without opinion. The order is printed in the Appendix at 71a-72a. The District Court granted Dr. Skehan's motion to plead and conduct his own case on September 12, 1977, without opinion. The order is printed in the Appendix at 73a-74a. The District Court denied Dr. Skehan's motion for a new trial on September 22, 1977, with opinion. The opinion and order are printed in the Appendix at 75a-77a and are unreported.

The Court of Appeals denied Dr. Skehan's motion to stay part of the District Court's order of July 20, 1977, pending final determination of all motions and appeals challenging it, on November 4, 1977, without opinion. The order is printed in the Appendix at 55a-56a. The Court of Appeals denied Dr. Skehan's motion to reconsider its order denying his motion for a stay, on November 30, 1977, without opinion. The order is printed in the Appendix at 53a-54a.

The Court of Appeals entered judgment on December 21, 1978, affirming the judgment of the District Court of July 20, 1977, excepting that the case was remanded to the District Court for consideration of an award of attorneys fees to Dr. Skehan against the defendants in their official capacities, on December 21, 1970, with opinion. The opinion and judgment are printed in the Appendix at pages 1a through 52a, and the opinion is reported at 590 F.2d 470 (3d Cir. 1978).

The Court of Appeals denied Dr. Skehan's petition for rehearing on February 14, 1979, without opinion. The order is printed in the Appendix at 55a-56a and is unreported.

On February 23, 1979, the Court of Appeals stayed issuance of its mandate until March 23, 1979. The Court's order is printed in the Appendix at 53a. On April 6, 1979, the Court of Appeals further stayed the issuance of its mandate until May 15, 1979. The order is printed in the Appendix at 54a.

Jurisdiction

The Court of Appeals entered judgment, affirming the judgment of the District Court, in part, and remanding for further proceedings, in part, on December 21, 1978. The Court of Appeals enlarged the time in which to file a petition for rehearing, and petitioner filed a timely petition on January 29, 1979, which was denied by order of February 14, 1979 (Appendix, pages 52a-53a).

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1), granting jurisdiction to this Court to review cases in the Courts of appeals by writ of certiorari before or after rendition of judgment.

Constitutional and Statutory Provisions Involved

This case involves Section 9, Article I, and Amendment XIV of the Constitution of the United States; Section 17, Article I, of the Constitution of the Commonwealth of Pennsylvania; Title 42 U.S.C. § § 1983 and 1988; the Pennsylvania Mandamus Act of 1893, as amended, 12 P.S. § 1911, *et seq.;* Section 2310 of Pennsylvania Act No. 78-152 (House Bill No. 2437), 42 Pa. C.S.A. § 2310. The texts of these constitutional and statutory provisions are reproduced at the end of this petition.

Statement of Questions Presented for Review

1. In damages suits against state bodies under Title 42 U.S.C. § 1983, should federal Courts decide independently whether such bodies are "persons" able to be sued or should they accept holdings of state Courts that such bodies are agencies of the state for which it claims sovereign immunity?

2. Are state colleges or their boards of trustees "persons" under Title 42 U.S.C. § 1983?

3. Was it settled constitutional law before this Court's decision in *Board of Regents v. Roth,* 408 U.S. 564 (1972), that a public college professor's liberty and property interests in a written contract providing for specific hearings before nonrenewal, suspension and dismissal, were protected by the due process clause?

4. Is a college official who denies due process hearings before termination of employment, required by contract and the due process clause, immune from suit under *Wood v. Strickland,* 420 U.S. 308 (1975), simply because the contract is not adjudicated by a Court before the denial of the hearings?

5. Does Pennsylvania Act No. 1978-152 (House Bill No. 2437) claim sovereign immunity from a claim for damages under Title 42 U.S.C. § 1988 in light of the historic state remedy of mandamus and the incorporation of state remedies into § 1988?

6. May a state annul a vested right of action by one of its citizens against it by enacting sovereign immunity with retroactive effect? May it do so with the assistance of the state's attorney, who is opposing the citizen in court, but without notice to the citizen or opportunity for him to be heard?

7. Where a college faculty member alleges that he was not renewed and was suspended and dismissed on account of protected speech and in violation of his right to hearings by faculty committees on the reasons for these actions, should a federal Court stay its hand until these academic procedures are completed?

8. Can a subsidiary governmental unit waive a defense of sovereign immunity by not raising it in the trial Court?

9. Where a defendant is permitted to raise sovereign immunity for the first time on plaintiff's appeal, should a plaintiff be given the right to amend his complaint and introduce new evidence on remand?

Statement of the Case

1. Nature of the Case

This is an action by a college professor who was non-renewed without hearings required by contract, who was later suspended without hearings required by contract and who was dismissed without a hearing required by contract in the middle of his contract term and who seeks reinstatement, back pay, and expenses of litigation, including attorneys fees.

He alleged that he was non-renewed, suspended and dismissed in retaliation for exercise of rights protected by the First Amendment and that the failure to afford him hearings before non-renewal, suspension and dismissal deprived him of procedural due process violative of the Fourteenth Amendment.

Jurisdiction of the District Court was invoked under Title 28 U.S.C. § 1343, granting jurisdiction over civil rights actions.

2. Statement of Facts

Dr. Skehan has been unemployed since October 17, 1970, when he was dismissed by the president of Bloomsburg State College from his post of associate professor of economics, excepting that he was employed in suspended status, without pay, pursuant to the judgment of the District Court, from July 20, 1977, through June 2, 1978.

The background of his employment and dismissal follows. In January, 1969, Bloomsburg State College appointed Dr. Skehan associate professor in the economics department. Dr. Skehan quickly became outspoken on issues of interest on campus, including matters of U.S. foreign policy and questions of college governance such as faculty and student powers and rights.

Plaintiff had a written contract of employment which automatically renewed itself unless the college president gave notice of non-renewal by specified dates. The contract ripened into permanent tenure after completion of the third year.

The written contract consisted of an individual writing naming Dr. Skehan, signed by him and the president of Bloomsburg State College, and incorporated by reference the existing college employment code.

Bloomsburg State College is one of 14 state colleges in Pennsylvania. It is subject to the Public School Code of 1949, as amended, Title 24 P.S. § § 20-2001, *et seq.* Bloomsburg State College is governed by a board of trustees consisting of nine members, having terms of six years. Trustees are selected from the five-county area around Bloomsburg, Pennsylvania, and include one member of the student body, two officials of neighboring primary-secondary school districts and two county or district political party officials. The board of trustees' powers include: (i) to review all matters pertaining to the welfare and well-being of the college and its students; (ii) to approve the annual operating and capital budget requirements for the institution prepared by the president; (iii) to review and approve all direct purchases made by the president without competitive bidding; and (iv) to approve the appointment of all employees, in accordance with law.

Bloomsburg State College receives some of its operating funds from state tax revenues but it also receives some of its operating funds from tuition and fees paid by students and their parents, from grants by private foundations and state and federal public agencies, from gifts by alumni and friends, and from rentals of property.

Bloomsburg State College has its own seal. The board of trustees has incorporated a subsidiary known as the Bloomsburg Foundation for the purpose of performing miscellaneous services at the college.

Dr. Skehan's contract was on its face between him and Bloomsburg State College, not the Commonwealth of Pennsylvania. The college employment code described faculty members as being "employed by the college."

The employment code provided for hearings before any faculty member could be suspended or dismissed. A faculty member could be suspended only if he were found to be a danger to himself or to others or if he were found guilty of treasonable or grossly immoral conduct. The employment code also provided that if an untenured faculty member's contract was not renewed, he could allege that the reason for the decision was violative of his academic freedom. Bloomsburg State College was then required to give him a hearing before a specified faculty committee on the reasons for non-renewal.

Dr. Skehan's employment contract was expressly renewed during the spring of 1969 for the 1969-70 academic year. On December 15, 1969, Dr. Skehan's contract automatically renewed itself for the 1970-71 academic year. No notice of non-renewal was sent by that date.

On December 18, 1969, Dr. Skehan was summoned to the office of the college president, where the president denounced him for his activism in faculty matters. He called Dr. Skehan's petition to the college regarding the rights of another professor as "childish" and "infantile".

In May, 1970, the president informed Dr. Skehan that his contract, although renewed for the 1970-1971 school year, would not be renewed for the 1971-72 year. Dr. Skehan responded by alleging that the decision not to renew his contract was made because of his outspokenness on campus issues.

During the fall of 1970, a dispute arose about scheduling in the economics department. By letter of October 9, 1970, the president purported to suspend Dr. Skehan for his conduct arising out of the scheduling dispute. Dr. Skehan replied by letter of October 12, 1970, that the suspension was not preceded by procedures called for in the college employment code and he demanded such procedures. On October 19, 1970, the president purported to dismiss Dr. Skehan "subject to final approval by the board of trustees." Dr. Skehan wrote each trustee a certified letter requesting hearings in accordance with the college employment code. However, on October 26, 1970, Dr. Skehan received a letter from the president saying that the board met on October 23, 1970, and confirmed the president's decision to dismiss Dr. Skehan and that, accordingly, he was "fully and finally terminated at the college effective October 16."

3. Course of the Proceedings

Dr. Skehan pursued remedies through professional channels and then, on October 10, 1972, began this action. On May 9, 1973, he prevailed in the District Court on his claim that his right to hearings before adverse actions by the college, protected by the due process clause, was violated (214a). After more than seven years of litigation, including a ruling in his favor in this Court in 1975 (176a), he has yet to receive any relief excepting: (i) he was restored to the college payroll by order of the Court (99a-101a) from July 20, 1977, through June 2, 1978; and (ii) the District Court ordered (99a-100a) a hearing by a specified faculty committee, which resulted in a

unanimous decision that the non-renewal of his employment contract in May, 1970, was for reasons which were violative of his academic freedom. The committee reported as follows.

"BLOOMSBURG STATE COLLEGE
Bloomsburg, Pennsylvania 17815

"FINAL REPORT OF THE COMMITTEE ON PROFESSIONAL AFFAIRS

"As a result of informal hearings held pursuant to Judge Muir's July 20, 1977 Order, the Committee on Professional Affairs, in accordance with Section 9a of the Statement of Policy of Bloomsburg State College in force in 1970, makes the following recommendation to the President of Bloomsburg State College:

"After reviewing the evidence submitted to this committee (Committee on Professional Affairs), we are of the opinion that the decision not to renew Dr. Skehan's contract was for reasons which were violative of his academic freedom.

"Further the committee has seen no convincing evidence that Dr. Skehan would not have been rehired had he remained silent about campus issues.

"Furthermore, the committee has seen written evidence attesting to Dr. Skehan's ability as an economist and educator written by his department chairman and others.

"The committee also has testimony from a former member of the Board of Trustees that the Board was not aware of all the facts in the case of Dr. Skehan before action was taken.

"Therefore, the committee recommends that the non-renewal of Dr. Skehan's contract be reconsidered; meanwhile he should be removed from suspended status, be placed at full academic status and be given a teaching assignment in the Department of Economics.

"In conclusion the committee sees no need for institution of formal proceedings to reconsider the non-renewal of Dr. Skehan.

"This recommendation, in the form of a motion, was passed unanimously by the Committee on Professional Affairs on December 2, 1977.

"/s/ Charles M. Brennan 12/5/77 Charles M. Brennan	/s/ Julius R. Kroschewsky 12-5-77 Julius R. Kroschewsky
"/s/ Stephen M. Bresett 12/6/77 Stephen M. Bresett	/s/ James C. Pomfret 12-6-77 James C. Pomfret
"/s/ James E. Cole 12/5/77 James E. Cole	/s/ June L. Trudnak 12-5-77 June L. Trudnak
"/s/ P. Joseph Garcia 12/5/77 P. Joseph Garcia	/s/ Norman E. White 12-5-77 Norman E. White
"/s/ JoAnne S. Growney 12/5/77 JoAnna S. Growney "	

The Court of Appeals has required (47a-52a) further proceedings in the District Court, which should lead to the award of attorneys fees under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988. The Court of Appeals has also authorized (44a-46a) proceedings in the lower Court to decide in the first instance whether, under the terms of the District Court's judgment of July 20, 1977, and in light of proceedings at the college level since that judgment, Dr. Skehan should now be reinstated to full faculty status.

Dr. Skehan has been denied back pay by reason of the following rulings in the lower Courts. The Court of Appeals permitted (192a-196a) the college to raise the defense of state sovereign immunity for the first time on Dr. Skehan's appeal in 1973, after trial in the District Court. The Court of Appeals then looked to (28a, 173a) *Brungard v. Hartman*, 12 Pa.Commw. 477, 315 A.2d 913 (1974), the decision of a hybrid trial and intermediate appellate Court, that state colleges are agencies of the Commonwealth for which it

claims sovereign immunity. The Court of Appeals held that *Brungard* was dispositive of the issue of sovereign immunity in this action under § 1983 *

Although the Court of Appeals considered (33a-39a) this Court's decision in *Monell v. Department of Social Services of City of New York*, ... U.S. ....., 98 S.Ct. 2018 (1978) on Dr. Skehan's more recent appeal, it made no independent inquiry to determine whether a state college was a "person" under § 1983.

The Court of Appeals also held that Pennsylvania had in force a doctrine of sovereign immunity which barred an action under § 1983 (30a-33a). In so doing, the Court of Appeals interpreted (32a-33a) a sovereign immunity act of the Pennsylvania Legislature, passed September 28, 1978, as barring a § 1983 claim, even though the act expressly preserved causes of action otherwise specifically authorized by statute and even though Pennsylvania had a long-standing mandamus act authorizing actions of this kind. The Court of Appeals ignored the mandamus act and the provisions of Title 42 § 1988 which expressly incorporate remedies provided by the common law and state statute and the remedies available for violations of § 1983.

The Court of Appeals accorded validity to the Pennsylvania act, as interpreted by it, even though the act annulled a vested right of action by Dr. Skehan retroactively and even though the act was hurried through the legislature with participation of the state's attorney, who was representing all the defendants in this action, but without notice to Dr. Skehan or opportunity for him to be heard. In fact, no legislative hearings were held.

---

* *Brungard v. Hartman, supra,* was a ruling on a motion to dismiss a complaint alleging that Mansfield State College was owned and operated by the state. Taking the complaint as true, the Court dismissed it.

The District Court, on remand, denied Dr. Skehan's motions to amend his complaint (151a-153a) and to introduce additional evidence (145a-150a) even though his lawsuit had been greatly changed by the raising of sovereign immunity for the first time in the Court of Appeals.

The District Court held (123a-126a) that the college president enjoyed official immunity for his violation of Dr. Skehan's constitutionally protected rights to hearings because the president did not and should not have known that he was acting in violation of clearly settled law in 1970, though that Court had found in 1973 that *Wieman v. Undegraff,* 344 U.S. 183 (1952), was "precisely the situation in the case at bar (214a)." The District Court held (124a-125a) that Dr. Skehan's rights were not established as a matter of constitutional law until this Court's decision in *Board of Regents v. Roth,* 408 U.S. 564 (1972). The Court of Appeals affirmed (43a-44a) and also held (44a) that the college president did not and should not have known that he was violating a contract because the contract had not been adjudicated by a Court until after this action was brought.

The District Court found (132a-135a, 137a-143a, 208a-212a), pursuant to Rule 52(a), F.R.C.P., that the actions taken by the college against Dr. Skehan were not primarily motivated by Dr. Skehan's outspokenness on campus issues and that they would have been taken for other reasons, including Dr. Skehan's conduct during the scheduling dispute. The Court of Appeals, while acknowledging (18a, 188a-190a) that there was much evidence to the contrary, sustained (17a-20a, 188a-190a) the District Court's findings as not clearly erroneous. The District Court made its findings in May, 1973, and March, 1977, before it ordered proceedings on the same general subject at the college level. As noted above, hearings in the fall of 1977, before a specified faculty committee, reached an opposite conclusion.

REASONS WHY WRIT SHOULD BE ALLOWED

1. The Court of Appeals has decided federal questions in ways in conflict with applicable decisions of this Court.

The failure of the Court of Appeals either to inquire whether Bloomsburg State College or its board of trustees were "persons" within the meaning of § 1983 or to direct the District Court to do so conflicts with *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Its reliance on a Pennsylvania Court's holding that state colleges share in sovereign immunity and its failure to inquire into federal law on the subject conflicts with *Monell* and *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, ... U.S. ...., 99 S.Ct. 1171 (1979).

In *Monell*, this Court decided that the Department of Social Services and the Board of Education of the City of New York were persons within the meaning of 42 U.S.C. § 1983. The Court reached its conclusion based on an analysis of § 1983, including its legislative history. The Court did not rely on the law of the State of New York as to whether the department or board shared in New York's sovereign immunity.

In *Lake Country*, this Court concluded that a bi-state authority lacked immunity under the Eleventh Amendment, in part, because the actual operation of the authority brought it outside the scope of the Eleventh Amendment, as a matter of federal constitutional law. This Court relied only in part on the intentions of California and Nevada in creating the authority, and this Court's decision suggests that a federal Court's interpretation of the scope of the Eleventh Amendment controls regardless of the law of the states regarding sovereign immunity of the authority.

The decision of the Court of Appeals (44a): that *Board of Regents v. Roth*, 408 U.S. 564 (1972), was "the first definitive holding" that termination of teachers' property interests in

their employment contracts with state institutions require due process hearings, is in conflict with the *Roth* decision itself and this Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976), and the earlier decisions of this Court making up the history of constitutional law outlined in *Roth* and *Paul*.

In *Roth*, this Court held that a faculty member who was deprived of a hearing on the reasons for his non-renewal did not have a cause of action under the due process clause because his contract did not require such hearings and because non-renewal, without reasons, did not stigmatize him. In reaching its decision, this Court reviewed the history of the protection of both "liberty" and "property" interests under the due process clause. The Court said that, under its prior decisions, it was well established that, where action prejudicial to faculty members implied that they were guilty of dishonesty or immorality, such faculty members were entitled to a hearing. The Court observed that a long line of cases held that where a person was stigmatized or seriously damaged in his standing and his associations in his community, he is entitled to notice and a hearing beforehand. Dr. Skehan's suspension and dismissal in mid contract stigmatized and damaged him in these ways because of the opprobrium associated with such drastic measures within his profession. Suspension means the faculty member is a danger to himself or others or has been found guilty of treasonable or grossly immoral conduct.

This Court, in *Roth*, also held that it was well established that college professors and staff members dismissed during the terms of their contracts were entitled to hearings in advance under the due process clause. This Court cited *Wieman v. Undegraff*, 344 U.S. 183 (1952), as having established the principle.

It is puzzling that the Court of Appeals characterized *Roth* as (44a) "the *first definitive holding* that a termination of teachers' property interests in their employment contracts

with state institutions required due process hearings (emphasis supplied)." This Court's statement to that effect in *Roth* was clearly a review of earlier holdings. *Roth* held that a teacher without a contract right to a hearing on the reasons for his non-renewal lacked a separate right to such a hearing under the Fourteenth Amendment.

In *Paul, supra,* this Court again summarized the history of the right of citizens to hearings before prejudicial action taken by the state. This Court observed that the right to a hearing in advance before being stigmatized was settled constitutional law at least as early as *United States v. Lovett,* 328 U.S. 303 (1946). This Court also cited in support of the principle, *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123 (1951) and *Wieman v. Undegraff, supra.*

The decision of the Court of Appeals (44a): that the college president acted "in good faith" because Dr. Skehan's contract was not adjudicated by a Court before he was denied hearings, is in conflict with this Court's decision in *Wood v. Strickland, supra.* In *Wood,* this Court held that a school official does not have immunity from suit when he acts in disregard of settled, indisputable law and violates constitutionally protected rights. While this Court was addressing itself to settled constitutional law, the rationale of *Wood* was that an official acting in good faith should not be subject to personal liability for damages. Where, as here, the college president acted in breach of a specific contract, which he renewed twice by his own signature, the inference of good faith is ruled out.

The Court of Appeals has equated "settled, indisputable law" with a declaratory judgment construing the obligations of the parties in the controversy. Since declaratory judgments will rarely be entered before constitutional violations occur, the Court of Appeals has converted the qualified immunity test of *Wood* to absolute immunity.

2. The Court of Appeals rendered a decision on an important question of federal law, which has not been squarely decided by this Court and which points out disharmony of decisions of this Court. Its decision is in conflict with the apparently controlling decision of this Court.

The Court of Appeals decided (173a) in 1976 that Bloomsburg State College and its board of trustees in their official capacities were absolutely immune from suit under § 1983. It reaffirmed (39a) this decision in 1978 after this Court decided *Monell, supra.* The Court of Appeals based its decision on *Edelman v. Jordan,* 415 U.S. 651 (1974), holding that the award of retroactive welfare benefits by reason of wrongful denial of benefits by state officials violated the Eleventh Amendment. *Edelman* was reaffirmed by this Court, after the Court of Appeals decision, in *Quern v. Jordan,* .... U.S. ...., 99 S.Ct. 1139 (1979). *Quern* also involved retroactive welfare benefits. The conclusive fact in the *Edelman* and *Quern* cases was that decisions of the lower Courts imposed liabilities which must be paid from public funds in the state treasury. *Edelman* and *Quern* did not deal with the question whether a state welfare department is a "person" under § 1983.

Monell, supra, on the other hand, was decided on the ground that the Department of Social Services and the Board of Education of the City of New York were "persons" within the meaning of § 1983 and without considering whether an award would be paid directly out of the New York State treasury. In this case, an award of back pay arguably must be paid from the state treasury (as the Court of Appeals assumed). In a sense, this is not so since at least some of the funds of Bloomsburg State College come from fees and tuition, grants and sources other than state taxes.

At the same time, Bloomsburg State College and its trustees in their official capacities are "persons" under § 1983, as interpreted by *Monell.* Or, at the very least, there is no discernible basis in *Monell* to distinguish a board of trustees of a state college from the Board of Education of the City of New York. That a state college is engaged in higher education as opposed to primary and secondary education is immaterial to its personhood.

Respondents may argue that the New York Board of Education is more independent fiscally from the State of New York than Bloomsburg State College is from the Commonwealth of Pennsylvania and that an award against the New York Board of Education is not an award against the New York State treasury. Such an argument would be antithetical to *Monell,* although it would find some support in *Edelman* and *Quern.* Since the decision in *Monell* did not deal with the *Edelman-Quern* state treasury issue, there is no factual basis in *Monell* to provide a basis of comparison.

The Court should follow *Monell* and make all boards of education subject to suit as "persons" regardless of the amount or directness of their funding by the state. Otherwise, the availability of redress under § 1983 would depend on the formal details of budgetary arrangements and would lead to technical and arbitrary distinctions. For example, primary and secondary education is funded directly by the state treasury in Hawaii. The Hawaii Board of Education would be immune, whereas the New York City Board of Education would not. Pennsylvania spends money on schools with a variety of formal ties to the Commonwealth, including private universities. The Commonwealth spends far more on the University of Pennsylvania, a "private," "Ivy League" university, than on Bloomsburg State College. Amenability of Bloomsburg State College to suit would have less impact on the state treasury than amenability of other institutions which are almost certainly suable under *Monell.*

Bloomsburg State College is readily recognizable as a person, even more so than the New York Board of Education. It has a campus, a faculty, a student body, an alumni body, trustees, officers, a seal, school spirit, colors, insignia, school songs, athletic teams and is known by its alumni as "alma mater" or "nourishing mother."* By comparison, the New York Board of Education is impersonal. Bloomsburg State College serves a five county area as does the New York Board of Education.

3. This petition raises additional questions of federal law which should be settled by this Court.

Complaints of illegal termination of public employees, both because of impermissible reasons such as retaliation for protected speech and because of lack of required prior hearings, are frequent. This Court has been called upon to establish guidelines for such actions. *Compare, Mt. Healthy City School District v. Doyle,* 429 U.S. 274 (1977). These cases frequently involve faculty members in higher education. *Compare, Roth, supra.* This is a case where the federal Courts both decided whether the faculty member was not renewed for impermissible reasons (the Courts answered: "no") and provided by final judgment for hearings on the same general question by a faculty committee, under the faculty member's employment contract (the committee answered: "yes").

---

* Colleges and universities have been personified in songs as of the feminine gender, as in these words, from the Yale Alma Mater: "A song for old Yale, For brave old Yale, Who hath stood in her glory long," "Songs of All the Colleges," Hinds, Noble & Eldredge (N.Y.C., 1906 ed.); and in this example: "Sons of Georgetown, Alma Mater, Surft Potomac's lovely daughter, Ever watching by the water, Smile on us today," "Everybody's Favorite Songs of the American Colleges," Comp. and Ed. by Bernard A. Young, Inter-collegiate Music (Boston, 1938).

In a dissenting opinion in *Roth, supra,* Mr. Justice Douglas observed that the Court of Appeals in that case concluded that, though a § 1983 action was pending in the district Court, the district Court should stay its hand until the academic procedures were completed. Mr. Justice Douglas approved that result. He quoted with approval the following language from *Sindermann v. Perry,* 430 F.2d 939 (5th Cir. 1970).

> "School constituted review bodies are the most appropriate forms for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination."

This Court should now squarely decide whether this is the correct approach and it should decide in the affirmative. Adjudication by a Court before adjudication by the faculty committee required by contract, deprives the college professor of the benefit of the contractual right to the committee determination. This right was carefully developed by the academic profession. Court hearings require lawyers, and other expenses. Court procedures are different and Courts are unfamiliar with academic concepts. The Court's non-expert determination will tend to sway the more expert faculty committee rather than vice versa.

The Court of Appeals accorded validity to an immunity statute enacted one day before oral argument in the Court of Appeals in 1978. It did so, although this act was passed by the legislature with the assistance of the state's attorney, who was opposing Dr. Skehan in this case, without notice to Dr. Skehan of the pendency of the bill or opportunity for him to be heard. The Court of Appeals interpreted the statute as barring Dr. Skehan's cause of action against the state college

and its board of trustees in their official capacities even though this action was begun in 1972 based on occurrences in 1970. The Court should, if the need arises in this case, decide whether such *ad hominem* legislation, enacted in such a fundamentally unfair way, is valid.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

CLETUS P. LYMAN,
RICHARD A. ASH,
LYMAN & ASH,
Attorneys for Petitioner,
1612 Latimer Street,
Philadelphia, PA 19103,
(215) 732-7040.

Constitutional and Statutory Provisions Involved in the Case

CONSTITUTION OF THE UNITED STATES

Article I, Section 9

. . . No Bill of Attainder or *ex post facto* law shall be passed . . .

Amendment XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA

Article I
Declaration of Rights

That the general, great and essential principles of liberty and free government may be recognized and unalterably established, WE DECLARE THAT—

* * *

Section 17. No *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed.

TITLE 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

TITLE 42 U.S.C. § 1988

(Reproduced in the Appendix, printed separately, at 92a).

Excerpts from the Pennsylvania Mandamus Act of 1893, as amended, 12 P.S. §§1911 *et seq.*

§ 1911. To whom writ may be issued

The several courts of common pleas shall, within their respective counties, have the power to issue writs of mandamus to all officers and magistrates elected or appointed in or for the respective county, or in or for any township, district, or place within such county, and to all corporations being or having their chief place of business within such county and to any corporation doing business or having its property, in whole or in part, within the county: Provided, The relief, act, duty, matter, or thing, the performance of which is sought, should be given or performed within such county; and the court of common pleas of the county in which the seat of government is or may be located shall have the power, and it shall be required, to issue the writ of mandamus to all officers of the executive department of the Commonwealth as defined in Article IV, section one, of the Constitution, except the Governor; all other heads of administrative departments of the State government, except the Secretary of Banking; all independent administrative boards or commissions of the State government and all departmental administrative boards or commissions of the State government. 1893, June 8, P.L. 345, § 1; 1899, April 28, P.L. 84, § 1; 1903, March 19, P.L. 32, § 1; 1913, June 19, P.L. 526, § 1; 1925, May 13, P.L. 664, § 1.

* * *

§ 1913. Who may apply

The writ of mandamus may issue upon the application of any person beneficially interested. 1893, June 8, P.L. 345, § 3.

* * *

§ 1915. Proceedings against board, other than a corporation

When the writ is sought against a board or body other than a corporation, it shall be directed to such board or body in their official capacity, and service shall be made upon a majority of the members thereof, unless the board or body was created by law and has a chairman or other presiding officer appointed pursuant to law, in which case service upon him shall be sufficient. 1893, June 8, P.L. 345, § 8.

* * *

§ 1919. Recovery of damages and costs

If a verdict is found for the plaintiff and judgment is entered thereon, or if a judgment is given for him upon a demurrer, or by *nihil dicit,* or for want of an answer, by *non sum informatus,* or other pleading, he shall recover his damages and costs. 1893, June 8, P.L. 345, § 16.

Section 2310 of Pennsylvania Act No. 78-152, 42 Pa. C.S.A. § 2310

§ 2310. Sovereign immunity reaffirmed; specific waiver

Pursuant to section 11 of Article I of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity. When the General Assembly specifically waives sovereign immunity, a claim against the Commonwealth and its officials and employees shall be brought only in such manner and in such courts and in such cases as directed by the provisions of Title 42 (relating to judiciary and judicial procedure) unless otherwise specifically authorized by statute.